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No. 84-645

In The

# Supreme Court of the United States

October Term, 1984

HUSTLER MAGAZINE, INC.,

*Petitioner-Defendant,*

vs.

LAJUAN and BILLY WOOD,

*Respondents-Plaintiffs.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## RESPONDENTS' BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Fifth Circuit decided the case below correctly and consistently with this Court's decisions and the guarantees of free speech and press embodied in the First Amendment?

2. Whether the Court should undertake a *de novo* review of the facts on writ of certiorari when the record establishes an invasion of privacy with convincing clarity?

## PARTIES TO THE PROCEEDING BELOW

The Plaintiffs-Respondents are LaJuan and Billy Wood.
The Defendant-Petitioner is Hustler Magazine, Inc.

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## RESPONDENTS' BRIEF IN OPPOSITION

## REFERENCE TO OPINIONS

The Judgment, Findings of Fact, and Conclusions of Law of the United States District Court for the Southern District of Texas, Houston Division, dated March 1, 1983, were not reported and are reproduced as Appendix A in

the petition already filed with the Court by Defendant-Petitioner, Hustler Magazine, Inc.

The original opinion of the United States Court of Appeals for the Fifth Circuit is reproduced in Appendix B of the petition filed by Defendant-Petitioner, Hustler Magazine, Inc.

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## JURISDICTION

The Judgment of the Court of Appeals for the Fifth Circuit was entered on July 23, 1984, and Rehearing En Banc was denied on September 11, 1984.

Defendant-Petitioner alleges that jurisdiction of this Court is based upon 28 U.S.C. Section 1254(1).

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## STATEMENT OF THE CASE

In the February 1980 issue of *Hustler* Magazine, Defendant-Petitioner published a nude photograph of LaJuan Wood without her consent. (Tr. Vol. I, pp. 12-13). That photograph appeared in a section of the magazine entitled "Beaver Hunt," along with a false, fabricated sexual fantasy. (Plaintiff's Exhibit 1, p. 94). At the time of publication Mrs. Wood was a housewife, mother and student at Texas A & M University where her husband, Billy Wood, taught engineering design graphics. (Tr. Vol. I, pp. 7, 34). Billy and LaJuan Wood were living in Bryan, Texas, a small town where Mrs. Wood had lived since she was six years old. (Tr. Vol. I, p. 7).

The photograph in question was actually taken by Mr. Wood in 1978 while the couple was swimming in a secluded

portion of Pedernales Falls State Park, near Dripping Springs, Texas. (Tr. Vol. I, p. 12). The photographs were developed at a Fed Mart store in Bryan, Texas upon the Woods' return trip home with the understanding of Mr. and Mrs. Wood that Fed Mart, used a mechanical process, and that no one saw or knew of the pictures except the Woods. (Tr. Vol. I, pp. 13-14). Billy Wood brought the photos home and put them under some papers in a bedroom drawer. (Tr. Vol. I, p. 13).

The Woods' home was then burglarized by Steve Simpson, who stole the photographs of Mrs. Wood. (Tr. Vol. II, p. 13). Simpson and his wife, Kelley McConkey Simpson (now Kelley Rhoades), sent one of the photos to Hustler, along with a forged consent form. (Tr. Vol. II, pp. 6-7, 14-16). They falsified Mrs. Woods' address, birthdate, and sexual fantasy. ("to be tied down and screwed by two bikers.") (Tr. Vol. II, pp. 14-16). They did not list a telephone number. (Defendant's Exhibit 9).

The photograph and consent form were subsequently received by Hustler which did not have a formal written policy outlining verification procedures. (Tr. Vol. II, p. 137). The informal policy consisted of sending a mailgram to the address listed on the release if no telephone number appeared on the release. (Tr. Vol. II, p. 100). The person receiving the mailgram would then call collect and answer questions about the release form. (Tr. Vol. II, p. 100). Hustler never verified the release by independent sources such as driver's license number or social security number. (Tr. Vol. II, pp. 133-145).

The mailgram was sent to "LaJuan Wood" at Kelley McConkey Simpson Rhoades' mother's house, and Kelley Rhoades called Hustler collect, leaving a fictitious phone

number and representing herself as LaJuan Wood. (Tr. Vol. II, pp. 32-37). Rhoades apparently spoke with Stephanie Ross for only two minutes, who asked her a series of leading yes-no questions.(Tr. Vol. II, pp. 32-37). The picture was then approved for publication, even though Mrs. Rhoades asked that the check for $50.00 be sent to Kelley McConkey at the address listed on the release as LaJuan Wood's.[1] (Tr. Vol. II, pp. 37-38).

Mrs. Wood's photograph then appeared in the section of *Hustler* Magazine entitled "Beaver Hunt", along with the designation "Photo by Husband" and the false sexual fantasy. (Plaintiff's Exhibit 1, p. 94). LaJuan and Billy Wood did not learn of the publication until a friend stopped by to tell them he had heard that LaJuan's picture was in *Hustler* Magazine. (Tr. Vol. I, pp. 9-11). Another friend called Mr. Wood at work that afternoon and confirmed the fact of the publication. (Tr. Vol. I, p. 11).

What followed was a period of severe anxiety and mental anguish for both LaJuan and Billy Wood. Mrs. Wood felt degraded, embarrassed, hurt, and angry. (Tr. Vol. I, pp. 20-21). She received three to four obscene phone calls per day. (Tr. Vol. I, p. 29). The Woods had marital difficulties because of the publication, and Mrs. Wood's reaction was so strong that she required psychological counseling. (Tr. Vol. I, pp. 26-29). Her psycholo-

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[1] The District Court found that Hustler published the photograph and accompanying text with reckless disregard for the truth or falsity of the material, and that "Hustler published the picture of LaJuan and the accompanying copy with reckless disregard for the offensiveness of the material." (Findings of Fact 13-15). The District Court also expressed grave doubts about Hustler's "verification procedure", and found that Hustler *failed even to follow its own procedure*. (Findings of Fact 12-13).

gist likened her reaction to that of a rape victim, in that she felt anger, frustration, and a sense of helplessness. (Tr. Vol. I, p. 104). There was uncontradicted evidence that LaJuan Wood's reaction, problems, and fears will continue into the future. (Tr. Vol. I, p. 97).

LaJuan and Billy Wood brought suit against Hustler on January 23, 1981, alleging libel and invasion of privacy. (Plaintiff's Original Complaint, R.A. 430). After a trial to the Court, judgment was entered on March 1, 1983, for Mrs. Wood in the amount of $150,000.00 and for Mr. Wood in the amount of $25,000.00 for invasion of privacy by placing them in a false light in the public eye and for public disclosure of private facts. (R.A. 20-38).

The United States Court of Appeals for the Fifth Circuit affirmed the judgment as to Mrs. Wood on the basis of false light invasion of privacy, but reversed the judgment for Mr. Wood. Petitioner-Defendant's Motion for Rehearing and Suggestion for Rehearing En Banc were denied by the Court of Appeals on September 11, 1984.

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## REASONS FOR DENYING THE WRIT

### I. The Court Of Appeals' Decision Is Correct And Consistent With This Court's Decisions And The Guarantees Of Free Speech And Press Embodied In The First Amendment.

#### A. The Court Of Appeals' Recognition Of A Private Citizen's Right To Privacy Does Not Conflict With The Rights Of Free Speech And Press Guaranteed By The First Amendment.

In 1974, while recognizing that tension necessarily existed between the protection commanded by First Amend-

ment rights and the States' protection of private citizens' reputations, this Honorable Court provided the States indispensable freedom in defining the standard of liability to be imposed upon publishers of defamatory falsehoods injurious to private individuals. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347-348 (1974). This Court recognized the importance of defining a broad rule which could be applied to accommodate the important competing individual and constitutional rights. 418 U.S. at 347. In *Gertz*, the Court not only reasoned that a private individual was more deserving of protection, but concluded that where no evidence of fame, notoriety, or societal involvement was apparent, "an individual should not be deemed a public personality for all aspects of his life." 418 U.S. at 353.

> Further, this Court has more recently indicated that:
> [T]here *is* a zone of privacy surrounding every individual, a zone within which the State may protect him from intrusion by the press, with all its attendant publicity.

*Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 488 (1975). In *Cox*, the Court expressly recognized that an invasion of an individual's right to privacy might lie where a publisher appropriates a name or photograph or works an intrusion into seclusion by publishing falsehoods. 420 U.S. at 490.

In their timeless article entitled *The Right to Privacy*, Warren and Brandeis aptly stated that:

> [M]odern enterprise and invention have, through invasions upon his privacy, subjected [man] to mental pain and distress, far greater than could be inflicted by mere bodily injury.

Warren and Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 196 (1890). Certainly those same observations, as well as the recognition of the right to privacy by this

Court, hold true where a nude photograph of a housewife is published without her consent in the context of a hard-core, sex-centered magazine. (Plaintiff's Exhibit 1, p. 94). The Fifth Circuit has followed the rationale in *Gertz* and, as in this case, has recognized a right of action in a private individual consistent with the rights guaranteed by the First Amendment when the publisher of a pornographic magazine recklessly invades that person's privacy by placing her in a false light in the public eye. *Braun v. Flynt,* 726 F.2d 245 (5th Cir. 1984), *cert. denied,* 105 S.Ct. 252 (1984).

Without doubt, Hustler blatantly invaded LaJuan Wood's right to privacy when it published her nude photograph, in context with a false fantasy, thereby placing her in a false light in the public eye. Mrs. Wood suffered severe mental anguish, humiliation, suffering, and harm to reputation. (Tr. Vol. I, pp. 20-21; 104). The Court of Appeals correctly upheld the judgment in Mrs. Wood's favor for false light invasion of privacy.

As this Honorable Court explained in *Time, Inc. v. Firestone,* 424 U.S. 448 (1976), mental anguish, humiliation, and suffering are all injuries which may be compensated for "consistently with the Constitution upon a showing of fault." 424 U.S. at 460. Such a showing was established at trial and ruled upon by the United States District Court. For these reasons alone, the writ should be denied.

**B. The Court Of Appeals Correctly Interpreted This Court's Decision In Gertz v. Robert Welch, Inc. As A Modification Of The Principles Announced In Time, Inc. v. Hill.**

In *Time, Inc. v. Hill,* 385 U.S. 374 (1967) this Court extended the *New York Times* "actual malice" standard to

preclude recovery under a New York right to privacy statute where false reports of matters of public interest were concerned. 385 U.S. at 387; *See also New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). The statute in *Time* provided a right of action to a newsworthy person when his name, picture, or portrait was the subject of a fictitious report or article. 385 U.S. at 384, n. 9.

Some writers have suggested that it would be a difficult task to determine the impact which *Gertz* had on *Time*. Pember and Teeter, *Privacy and the Press Since Time, Inc. v. Hill,* 50 Wash. L. Rev. 57, 75 (1974). Yet the same writers suggest that use of a "public interest test" would be inappropriate for protecting an individual's right to privacy because areas of private life remain private by definition. *Id.* at 77. This Court's decision in *Gertz* can logically be interpreted as a modification of the "false-light" principles announced in *Time, Inc. v. Hill,* 385 U.S. 374 (1967), for several reasons.

First, extension of the *New York Times* barrier to bar recovery by private citizens injured by publication of defamatory falsehoods would significantly abridge, for no justifiable reason, the individual's right to protection from this type harm. *See Time, Inc. v. Firestone,* 424 U.S. 448, 456-57 (1976). That is the exact rationale which led this Court to reject the subject matter or "public interest test" for determination of whether a private individual's recovery for injuries occasioned by defamatory falsehoods was precluded by the *New York Times* "actual malice" standard. *See generally Gertz v. Robert Welch, Inc.,* 418 U.S. 323 (1974); *Time, Inc. v. Firestone,* 424 U.S. 448, 456-57 (1976). Similarly, the same rationale holds true where a

publisher claims a privilege on First Amendment grounds that a publication of a private citizen's nude photograph, along with a false sexual fantasy, is a matter of public interest.

Second, Dean Prosser has stated appropriately that:

> [T]here has been a good deal of overlapping of defamation in the false light cases, and apparently either action, or both will very often lie.

Prosser, *Privacy,* 48 Calif. L.Rev. 383, 400 (1960). The interest [concerned] in false light cases is that of reputation, "with the same overtones of mental distress as in defamation." *Id.* Further, "false light invasions of privacy, like defamation, necessarily involve "falsity". *Id.* at p. 407. Thus it is logical, as well as reasonable, to apply the rationale announced by the Court in *Gertz* for defamation cases to false light invasion of privacy cases, especially where a private citizen is concerned.

Further, application of the principles announced by the Court in *Time, Inc. v. Hill* to false-light invasion of privacy cases would involve Courts in *ad hoc* determinations of matters of public interest. That is the exact result of which the Court expressly disapproved in *Gertz. Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 345-346 (1974). The Court specifically stated that:

> [T]he "public or general interest" test for determining the applicability of the *New York Times* standard to private defamation actions inadequately serves both of the competing values at stake. 418 U.S. at 346.

The reasoning in *Time, Inc. v. Hill,* 385 U.S. 374 (1967) would impose the *New York Times* barrier upon a private citizen placed in a false light in the public eye merely be-

cause the situation constituted a "matter of public interest." 385 U.S. at 387-88.

Ideally, the principles announced by this Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), should apply to false-light invasion of privacy cases because of the important right a person has to protection of his privacy, the fact that the right to privacy deserves Constitutional protection, and because of the inherent overlap between the torts of defamation and false-light invasion of privacy. *McKenna, False-Light: Invasion of Privacy?*, 15 Tulsa L.J. 113, 136-37 (1979). The Court of Appeals correctly interpreted this Honorable Court's decision in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) as a modification of the principles announced in *Time, Inc. v. Hill*, 385 U.S. 374 (1967). For these reasons, the writ should be denied.

**II. The Court Should Not Undertake A Review Of The Facts On Writ Of Certiorari Because The Record Establishes An Invasion Of Privacy With Convincing Clarity.**

Hustler challenges the District Court's findings of fact that Hustler failed to follow its own "verification procedure," and urges this Court to undertake a *de novo* review of the facts in this case. This Court should deny the writ and refuse to undertake a review of facts already found and accepted as such by both the District Court and the Court of Appeals because those facts are not clearly erroneous and establish with convincing clarity that Hustler worked an outrageous invasion of LaJuan Wood's privacy. (Findings of Fact 12-13). The District Court expressed "grave doubts about the adequacy of Hustler's verification process." (Findings of Fact 12). Further,

the District Court ruled it unnecessary to decide whether the "procedure" was adequate because the Court found that Hustler failed to follow its own "procedure".[2] Findings of Fact 12). Based upon these facts and the other testimony obtained at trial, the District Court concluded that Hustler acted with reckless disregard for whether the information in the release was true and for whether LaJuan actually consented to the publication. (Findings of Fact 15). Further, the District Court found that the Hustler employee charged with verification in this case, Stephanie Ross, displayed an attitude which impaired her ability to evaluate the validity of the release. (Findings of Fact 13). Judging Stephanie Ross' credibility on the stand, the Court also found that it would be impossible to convince her of the fraudulence of *any* release. (Findings of Fact 13).

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[2] Specifically, Jim Heinsch, Managing Editor for Hustler at the time of the publication in question, testified that if anything suspicious appeared on the face of the release be photographed and accompanying text would not be published. (Tr. Vol. II, p. 125). However, that very procedure was disregarded by Hustler, as Hustler's Research Assistant, Stephanie Ross, and Hustler's Associate Editor, Kelly Garrett, indicated that the research staff members considered the submission of the photograph, accompanying text, and Mrs. Wood's name "with some mirth, that this ['Lay you on Wood'] was a very clever play on words." (Tr. Vol. I, p. 52). Also, Hustler made no attempt to determine the identity of Kelley McConkey or her relationship to Mr. and Mrs. Wood, even though the release indicated that the prize money was to be mailed to her and listed the same address as Mrs. Wood. (Tr. Vol. I, p. 7). Further, Stephanie Ross, as Research Assistant for *Hustler* Magazine charged with the responsibility of verifying the release, failed to meet even the rudimentary requirements that Hustler had set for verifications. (Tr. Vol. I, p. 7). Finally, Hustler failed to request a social security number in the release from that which Kelley McConkey prepared, even though the February 1980 edition of *Hustler* Magazine included such a request for verification purposes.

In addition to the findings of fact made by the District Court and accepted by the Court of Appeals, Federal Rule of Civil Procedure 52(a) provides in pertinent part that:

> [F]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the Trial Court to judge the credibility of the witnesses . . .

This Court should not undertake a *de novo* review of the findings of fact made by the District Court and accepted by the Court of Appeals because those findings are not clearly erroneous. The findings of fact establish reckless disregard for the truth or falsity of the matters published on Hustler's part, as well as a reckless disregard for the offensiveness of the material published. (Findings of Fact 15).

Petitioner cites *Bose Corp. v. Consumers Union of U. S., Inc.*, 104 S.Ct. 1949 (1984), for authority that this Court should undertake a *de novo* review of the facts in this case. In *Bose*, the Court was concerned with a product disparagement suit, not an invasion of privacy. 104 S.Ct. at 1953. Further, petitioner Bose Corporation was a public figure, and did not contest the applicability of the *New York Times* actual malice standard. 104 S.Ct. at 1955.

In this case, the facts first establish with convincing clarity an invasion of privacy and second LaJuan Wood was not a public figure. (Findings of Fact 17-18). Thus, the *New York Times* "actual malice" test is not applicable here. Even if that standard were applicable under *Time, Inc. v. Hill*, 385 U.S. 374 (1967), it would not bar recovery for false light invasion of privacy because the picture of La-

Juan Wood in the nude was of no legitimate concern to the public. (Findings of Fact 17). Further, this Honorable Court should not undertake a review of the facts on writ of certiorari because the record establishes reckless disregard on Hustlers' part for the truth or falsity of the publication, as well as an invasion of LaJuan Wood's privacy. As stated in *Bose,* "such determinations are best left to the trial judge." *Bose Corp. v. Consumers Union of U.S., Inc.,* 104 S.Ct. 1949, 1969 (1984) (Rehnquist, J., joined by O'Connor, J., dissenting).

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## CONCLUSION

In conclusion, the petition for writ of certiorari should be denied because the Court of Appeals' decision below is consistent with this Court's applicable decisions. The Court of Appeals' recognition of a private citizen's right to privacy does not conflict with the rights guaranteed by the First Amendment. The petition for writ of certiorari should be denied for this reason alone.

Further, the Fifth Circuit Court of Appeals correctly interpreted this Court's decision in *Gertz v. Robert Welch, Inc.* as a modification of the principles announced applicable to false-light privacy cases in *Time, Inc. v. Hill.* This Court should not undertake a review of the facts in this case on writ of certiorari because the record establishes an invasion of LaJuan Wood's privacy by Hustler, as well as "actual malice" on Hustler's part, with convincing clar-

ity. For each of these reasons alone the writ should be denied.

Respectfully submitted,

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